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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ROMAN GALIVO FLORES, JR.,<br>Defendant and Appellant. | G040353<br>(Super. Ct. No. 07HF1103)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed with directions.

Kristin A. Erickson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and Raymond M. DiGuiseppe, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Roman Galivo Flores, Jr., of two counts of first degree robbery in concert (Pen. Code, §§ 211, 212.5, subd. (a), 213, subd. (a)(1))[1]; three counts of false imprisonment by violence (§§ 236, 237, subd. (a)); and one count of first degree residential burglary (§§ 459, 460, subd. (a)). The jury found defendant was armed with a firearm during the commission of all counts. The jury further found a nonaccomplice was present during commission of the residential burglary. The court sentenced defendant to an aggregate term of 10 years and four months. Defendant's primary contention on appeal is that the court erred by failing to instruct the jury on duress. We affirm the judgment, but direct the modification of a minute order to correct a clerical error.

## FACTS

In May 2007, Gurinder Bhangoo, a student at the University of California, Irvine, lived in an apartment in off-campus student housing with two roommates, Christopher Trinh and Dwight Lubrin. Bhangoo had known defendant for about eight months at the time and had sold him marijuana on about 10 to 14 occasions at Bhangoo's apartment. Bhangoo had a prescription for medical marijuana and obtained his supply from a local cannabis club. Defendant knew that Bhangoo stored his marijuana in a black box inside a cabinet in his bedroom.

On the afternoon of May 24, 2007, defendant phoned Bhangoo and said he wanted to buy some marijuana. Bhangoo told defendant to text him when he wanted to "come over." Around 6:15 p.m., defendant texted Bhangoo, "asking how much for an ounce." Bhangoo texted back, "$400." Defendant texted back he would "be coming over" in 30 minutes. An ounce was a far greater quantity than defendant typically

[1] All statutory references are to the Penal Code.

bought. (Previously he had bought from Bhangoo at most "an eighth of an ounce.") At the time, Bhangoo had "about 2.5 to 3 ounces" of marijuana in the black box.

At around 6:30 that evening, defendant entered Bhangoo's apartment through the unlocked front door. Bhangoo and Lubrin were sitting on sofas in the living room, along with their friends, Albert Ly and "Mike." Bhangoo and Lubrin worked on their laptops. Trinh was in his bedroom.

Bhangoo got up, shook defendant's hand, and said, "What's up?" Bhangoo then returned to his seat on the couch, planning to "smoke" with defendant before starting the sale transaction.

About 10 seconds to five minutes later, two other men walked in. One, later identified as David Tilley, held a gun. The other, later identified as Steven Astorga, carried a bat. Bhangoo did not know Tilley or Astorga. Defendant had not indicated he would be bringing anyone with him.

Tilley faced "everybody on the couch" and said, "Nobody move." About 10 seconds later, everyone heard Trinh's bedroom door close. Tilly ran to Trinh's door and yelled, "You better open this door or I'm going to blow it down." Trinh emerged from the bedroom. Holding the gun to Trinh's head, Tilley made Trinh sit on the couch beside Bhangoo.

Tilley pointed the gun at everyone sitting on the sofas, "holding [them] all down." Astorga stood by, "intimidating" them. Defendant stood next to some stools.

Tilley looked directly at Bhangoo and asked, "Where is the weed at?" Bhangoo replied, "He knows where it's at," and pointed to defendant. Tilly told defendant to "hurry up . . . and get the stuff." Defendant went into Bhangoo's bedroom and came back out with the black box containing the marijuana. Meanwhile, Tilley stayed behind and demanded Bhangoo's and Lubrin's laptops. He also asked for their wallets and jewelry, but no one gave him anything. About 30 seconds later, defendant, Tilley and Astorga left the apartment together.

About 15 minutes later, Bhangoo sent defendant a text message, saying, "I just want my laptop back." After about five minutes, defendant texted back, "He said buy them back." Bhangoo asked, "How much do I have to pay?" About five minutes later, defendant replied, "$300 for it." Defendant then texted, "On some real shit, kno u got all yer shit on it will give back just give em da money." That night defendant texted again, "$150 for it plain and simple." A few days later, Bhangoo asked defendant again to drop the laptop off and "told him that [he had] text messages as evidence against him." Defendant replied, "Dude this is how the game goes, it is a dirty game." Later defendant texted, "I did not rob you homi, I was eating with my girlfriend."

Defendant never apologized to Bhangoo nor did he indicate "he was surprised by what happened in the apartment." He never returned or offered to pay for any of the property taken. Bhangoo had watched defendant throughout the incident in the apartment. Defendant had never looked "surprised by what was going on," nor had he tried to warn or help the victims. Although Tilley had seemed to be in charge, neither defendant nor Astorga had appeared to be acting against their will.

A police search of defendant's apartment uncovered the black box and several containers "that at one time held marijuana." Further investigation revealed Tilley had sold the laptops to two coworkers.

## DISCUSSION

*The Evidence Did Not Support Instructing the Jury on Duress*

Defendant contends the court erred by refusing his request that the jury be instructed with CALCRIM No. 3402 on duress.[2] The court explained there was no

[2] CALCRIM No. 3402 provides: "The defendant is not guilty of <insert crime[s]> if (he/she) acted under duress. The defendant acted under duress if, because of threat or menace, (he/she) believed that (his/her/ [or] someone else's) life would be in

evidence "defendant was under duress to commit the crimes." The court opined the only way "in this case that evidence [of duress] would have come in would have been some testimony from either a crime partner or the defendant himself," and noted that defendant had chosen not to testify.

Under section 26, a person who commits a crime under duress is incapable of committing the crime. Section 26 provides that a person acts under duress when he or she commits an act "under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." Thus, in order to meet section 26's requirements, a defendant's belief in life endangerment must be reasonable and actual, and based on sufficient threats and menaces.

"An essential component of this defense is that the defendant be faced with a direct or implied demand that he or she commit the charged crime." (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 567.) "'The common characteristic of all the decisions upholding [a duress defense] lies in the immediacy and imminency of the threatened action: each represents the situation of a present and active aggressor threatening immediate danger." (*People v. Vieira* (2005) 35 Cal.4th 264, 290.) "'Because of the immediacy requirement, a person committing a crime under duress has only the choice of imminent death or executing the requested crime. The person being threatened has no time to formulate what is a reasonable and viable course of conduct nor to formulate criminal intent. The unlawful acts of the person under duress are attributed to the coercing party who supplies the requisite mens rea and is liable for the crime.'" (*People v. Petznick* (2003) 114 Cal.App.4th 663, 676.) "The basic rationale behind allowing the defense of duress for [crimes other than murder] 'is that, for reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the

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immediate danger if (he/she) refused a demand or request to commit the crime[s]. The demand or request may have been express or implied. [¶] The defendant's belief that (his/her/ [or] someone else's) life was in immediate danger must have been reasonable."

lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person'" (imminent death). (*People v. Anderson* (2002) 28 Cal.4th 767, 772.)

A "criminal defendant is entitled to adequate instructions on the defense theory of the case" if supported by the law and evidence. (*Conde v. Henry* (9th Cir. 1998) 198 F.3d 734, 739.) "A trial court is required to instruct sua sponte on a duress defense if there is substantial evidence of the defense and if it is not inconsistent with the defendant's theory of the case." (*People v. Wilson* (2005) 36 Cal.4th 309, 331.) "'Substantial evidence is "evidence sufficient 'to deserve consideration by the jury,' not 'whenever *any* evidence is presented, no matter how weak.'"'" (*Ibid.*) Evidence deserves a jury's consideration if, based on that evidence, reasonable jurors "'"could have concluded"' that the specific facts supporting the instruction existed." (*People v. Petznick, supra,* 114 Cal.App.4th at p. 677.) "In deciding whether defendant was entitled to the instructions urged, we take the proffered evidence as true, 'regardless of whether it was of a character to inspire belief. [Citations.]'" (*Ibid.*) '"'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.'"' (*Ibid.*) "Defendant needs to raise only a reasonable doubt [about whether] he acted in the exercise of his free will" (*id.* at p. 676), because the duress defense "negates proof of an element of the charged offense" (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390), i.e. intent.

Defendant contends the following evidence entitled him to the duress instruction: (1) He arrived at the apartment up to "five minutes before Tilley and Astorga entered." (2) He was unarmed while Tilley had a gun and Astorga had a bat. (3) He made no "demands of any of the victims" and "never communicated with Tilley or Astorga during the robbery," while Tilley gave all the orders (including demanding the laptops) and both Tilley and Astorga acted "aggressive[ly] and threatening[ly]." (4) Tilley was "pointing the gun at everyone," including defendant. (5) Defendant made

"text messages following the robbery [that] implied [he] was still receiving orders from someone else."

This evidence, taken together and viewed in defendant's favor, fails to raise a reasonable doubt as to whether defendant acted of his own free will. Based on this evidence, no reasonable jury could have concluded defendant reasonably and actually believed he faced imminent death if he refused to commit the robberies and other crimes. There is no evidence an aggressor expressly or impliedly threatened immediate action against defendant — no evidence Tilley or Astorga acted aggressively or threateningly *toward defendant*, nor any evidence Tilley ever pointed the gun *at defendant.* Even if Tilley was in general pointing the gun at "everyone," such a broad assertion includes everyone present, including Astorga. "[T]here is no direct evidence of duress at all." (*People v. Petznick, supra,* 114 Cal.App.4th at p. 677.) Rather, all the evidence suggested defendant participated in and facilitated the crimes. "The suggestion that defendant's participation was coerced by an imminent threat to his life is pure speculation. We find no error in the trial court's refusal to give the duress instructions." (*Id.* at p. 678.)

*The Court's Imposition of Consecutive Terms Did Not Violate Defendant's Sixth Amendment Right to a Jury Trial*

For purposes of preserving his claim for federal review, defendant contends the court violated his constitutional right to a jury trial under the Sixth and Fourteenth Amendments by sentencing him to *consecutive terms* based on factual findings made by a judge by a preponderance of the evidence, rather than by a jury beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Cunningham v. California* (2007) 549 U.S. 270, 288.) After defendant filed his opening brief, the United States Supreme Court issued its decision in *Oregon v. Ice* (2009) __ US __ , 129 S.Ct. 711, holding the Sixth Amendment does not "mandate jury determination of any fact declared

necessary to the imposition of consecutive, in lieu of concurrent, sentences." (*Id.* at p. 714.) The Supreme Court observed that, while "determining whether the prosecution has proved each element of an offense beyond a reasonable doubt" has historically been a function of the jury (*id.* at p.714), traditionally "the jury played no role in the decision to impose sentences consecutively or concurrently" (*id.* at p.717). "Instead, specification of the regime for administering multiple sentences has long been considered the prerogative of state legislatures." (*Ibid.*) Accordingly, "in light of historical practice and the authority of States over administration of their criminal justice systems" (*id.* at pp.714-715), the Supreme Court held that Oregon's choice to "constrain judges' discretion by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences" does not violate the Sixth Amendment (*id.* at pp. 714-715). Accordingly, here, the court's imposition of consecutive terms did not violate defendant's constitutional right to a jury trial.

*The February 22, 2008 Minute Order Must Be Amended*

The February 22, 2008 minute order of the sentencing hearing incorrectly states at sequence number 20 that defendant pleaded guilty to count two. This entry must be corrected to reflect that the jury found defendant guilty of count two. "'[A] court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

## DISPOSITION

The court is directed to correct the February 22, 2008 minute order to reflect that the jury found defendant guilty of count two and to delete the erroneous entry that defendant pleaded guilty to count two. The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.